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Case No. 90-40

Supreme Court, U.S.
FILED
AUG 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PATRICIA C. FOSTER, et vir,

Petitioners,

vs.

MICHAEL STEIN, et ux,

Respondents.

Petition for Writ of *Certiorari*
To the Supreme Court of the State of Florida

PETITIONERS' REPLY

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Table of Contents

Table of Contents ..... (i)

Table of Authorities ..... (ii)

PETITIONERS' REPLY 1

SUMMARY OF REPLY 1

ARGUMENTS 2

I A FORMAL RAISING OF A FEDERAL QUESTION IS NOT REQUIRED; IT ONLY REQUIRES THE ISSUE MUST NECESSARILY HAVE BEEN INVOLVED IN THE CASE 2

II A JUDGE SHOULD NOT BE PRESUMED TO BE IGNORANT OF THE LAW 4

III ADEQUATE STATE GROUNDS IS NO DEFENSE WHERE A FEDERAL RIGHT HAS BEEN VIOLATED 5

CONCLUSION 6

APPENDIX A-1

Table of Authorities

CASES

Alexander v. First National Bank of Titusville, 275 So.2d 272 (Fla. 1st DCA, 1985) 3

Brennan v. University of Kansas, 451 F.2d 1287 (Kan., 1971) 3

Boelens v. Redman Homes, Inc., 759 F.2d 504 (5th Cir., 1985) 3

DeClaire v. Yohanon, 453 So.2d 375 (Fla., 1984) 3, 4

Downs v. United States, 564 F.2d 48 (1977) 4

Duncan v. Louisiana, 391 U.S. 145 (1968) 4

Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968) 3, 4

Gibbs v. Burke, 337 U.S. 773 (1949) 3, 4

Gordon v. Watson, 622 F.2d 120 (11th Cir., 1980) 1

Hazel-Atlas Glass v. Hartford Empire 322 U.S. 238 (1943) 3

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 62 A.L.R. 785 (1928) 3

Standard Sanitary Mfg. Co. v. United States 226 U.S. 20 (1912) 4

Street v. New York, 394 U.S. 576, 582 (1969) 3

United States v. Houston, 4 M.J. 729 (AFCMR, 1978) 4

United States v. Murdock, 290 U.S. 389 (1933) 4

United States v. Throckmorton, 98 U.S. 61 (1878) 3

Westcott v. Westcott, 444 So.2d 495 (Fla., 2d DCA 1984) 3, 4

CODES

United States

28 U.S.C. § 1653 3

RULES AND REGULATIONS
United States
F.R.Civ.P., R. 44.1 4
F.R.Evid., Rule 201 and 302 4
MISCELLANEOUS
Moore's Federal Practice (Vol. 7, 1972)
¶¶ 60.33, 60.36, 60.37 3
Moore's Federal Practice (Vol. 7, 2nd ed., 1979)
¶ 60.33 3

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PETITIONERS' REPLY

SUMMARY OF REPLY

Respondents misstate the facts and the law to this court. The trial court petition was *verified*, which is tantamount to testimony.[1] OA, p. 28. It was respondent who presented no evidence, not even an unverified pleading. The facts of lack of personal and subject matter *jurisdiction* were open and notorious, and clearly stated in the petition for relief. Moreover, the leading cases cited by Petitioners in the trial court

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[1] A verified pleading may itself be treated as an affidavit. *E.g.*, *Gordon v. Watson*, 622 F.2d 120 (11th Cir., 1980)

petition for relief from the judgment relied primarily on federal standards raising federal constitutional issues. Finally, Respondents presentation of consent forms with putative neutral witnesses, OA, p. 10 and 12, is clearly an artifact presented to deceive this court. There is no witness named "Miriam Fein"; the signer was "Miriam Stein" respondent Michael Stein's own mother. Exhibit 1.[2] The other alleged witness is Michael Stein's own sister signing in her married name. Petitioners claim Patricia never signed any document in anyone's presence, the crux of this case. OA, p. 19, ¶ 4.

Respondents would have this court believe that the trial judge is ignorant of the law and did not understand the legal principles treated by the cited cases. The appendix herein sets forth the full oral argument and demonstrates that the judge cut off Petitioners' presentation of arguments below, indicating a detailed understanding of the law and facts of the motion.

Adequate state grounds is not stated where there has been the violation of clearly established federal rights.

ARGUMENTS

I

A FORMAL RAISING OF A FEDERAL QUESTION IS NOT REQUIRED; IT ONLY REQUIRES THE ISSUE MUST NECESSARILY HAVE BEEN INVOLVED IN THE CASE

Respondents by their Opposition claim that Petitioners failed to raise and preserve the alleged federal constitutional questions. Opp., p. 1, 5, 6.

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[2] Pursuant to USSC Rule 32, a copy of the putative consent signed by Petitioner Patricia Foster is being lodged with the Clerk of this court for the Court's review. The consent form signed by Michael Stein is not available.

The issue of whether a federal question was sufficiently and properly raised in the state court is itself ultimately a federal question, as to which this Court is not bound by the decisions of the state courts.[3] *Street v. New York*, 394 U.S. 576, 582 (1969). Though the formal raising of a federal question is not essential, it must necessarily have been involved in the cause. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 62 A.L.R. 785 (1928). A party is not barred by a failure to cite below the proper constitutional provisions when the lower court considered the relevant provisions. *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n.3 (1968); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949).

The petition to the trial court *cited DeClaire v. Yohanon*, 453 So.2d 375 (Fla., 1984), OA, p. 24, *Alexander v. First National Bank of Titusville*, 275 So.2d 272 (Fla. 1st DCA, 1985) and *Westcott v. Westcott*, 444 So.2d 495, 497 (Fla., 2d DCA 1984). OA, p. 25.

DeClaire was based primarily on federal standards and federal constitutional issues relying primarily upon *United States v. Throckmorton*, 98 U.S. 61, 65-66 (1878). *DeClaire*, *supra*, 444 So.2d, at 377. *Alexander* rested in part on federal standards *citing Toscaro v. C.I.R.*, 441 F.2d 930, 933 (9th Cir., 1971) and 7 Moore's Federal Practice (1972) ¶¶ 60.33, 60.36, 60.37. *Alexander*, *supra*, 275 So.2d, at 274. *Westcott* also was based primarily on federal standards and federal constitutional issues *citing Hazel-Atlas Glass v. Hartford Empire*, 322 U.S. 238 (1943) and 7 Moore's Federal Practice ¶ 60.33 (2nd

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[3] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate court." 28 U.S.C. § 1653. This section has been construed to permit amendment of technically defective allegations of a federal question. *Cf., Boelens v. Redman Homes, Inc.*, 759 F.2d 504 (5th Cir., 1985) (cannot use to substitute new cause of action) *with Brennan v. University of Kansas*, 451 F.2d 1287 (Kan., 1971) (amendment will be permitted only where it would avail plaintiff). This court can deem the trial court petition amended so far as technicalities are concerned, in view of the fact that cases in support of the federal questions were urged and the trial court therefore necessarily decided the issues.

ed., 1979). *Westcott, supra*, 444 So.2d, at 497.

Moreover, the Florida Appellate Court considered the issues and found them moot because it held that the judge was not qualified, *citing DeClaire, supra* in footnote 7. PA, p. 6.

The cases cited by Respondents in their Opposition at page 10 for the proposition that a "mere reference" is not sufficient, do not support Respondents' claim and conflict with this Court's opinions *cited ante* by Petitioners. *E.g., Dyke supra,* 391 U.S., at 217 n.3; *Gibbs, supra,* 337 U.S., at 779. Respondents' citations have been eroded by the passage of time and cases from this Court which have held that the Bill of Rights is now applicable to the states by virtue of the 14th Amendment. *Generally, Duncan v. Louisiana*, 391 U.S. 145 (1968).[4]

The issues were therefore necessarily decided by the trial judge in denying Petitioners' application for relief.

II

A JUDGE SHOULD NOT BE PRESUMED TO BE IGNORANT OF THE LAW

Ignorance of the law is no defense. *Eg., Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *United States v. Murdock*, 290 U.S. 389, 393-396 (1933). Judges are presumed to know the law. F.R.Civ.P., R. 44.1; F.R.Evid., Rule 201 and 302; *Downs v. United States*, 564 F.2d 48 (1977); *United States v. Houston*, 4 M.J. 729 (AFCMR, 1978).

Respondents, in the face of the trial court's comments that it had read, in *detail*, the pleading, RA, p. 3, 4, 9, would impute ignorance or stupidity on the part of the judge. Clearly, based on the cases cited by petitioners (RA, p. 4, last

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[4] See text associated with footnotes 4 to 12.

paragraph) and the trial court's remarks, the trial court understood that federal questions were involved, and necessarily decided the issues adversely to Petitioners.

III

ADEQUATE STATE GROUNDS IS NO DEFENSE WHERE A FEDERAL RIGHT HAS BEEN VIOLATED

This court in *Chapman v. California*, 386 U.S. 18 (1967) was faced with the contention that California had the right to provide greater protections for the People, and therefore the decision of the State Court had adequate state grounds, and had done so by a provision to allow comment on a defendant's right to remain silent. The court rejected the adequate state grounds argument in the face of a clear violation of federal standards.

In this case, the adequate state grounds argument is no answer if in fact there is a violation of a federal constitutional right, and the decision departs from standards announced by this court. The petition demonstrates that there was a clear departure from this Court's decisions, therefore there simply is no adequate state grounds.

CONCLUSION

WHEREFORE, Petitioners pray for all that relief requested by their petition.

Dated: August 7, 1990

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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA[1]

FAMILY DIVISION

CASE NO. 86-42848

MICHAEL STEIN, :

Petitioner, :

vs. :

PATRICIA (CLARK) FOSTER :
and BRENT FOSTER,
her husband, :

Respondents. :

Cutler Ridge Courthouse
10710 S.W. 211th Street
Miami, Florida
June 1, 1988
8:15 a.m.

The above-styled cause came on for hearing before the Honorable Edward H. Swanko, Circuit Court Judge Family Division, pursuant to Notice.

[1] The Appendix page numbers correspond to the original reporters transcript.

APPEARANCES:

FRUMKES & GREENE, P.A.
BY: MELVYN B. FRUMKES, ESQUIRE
on behalf of the Petitioner

BUCHBINDER & ELEGANT, P.A.
BY: IRA ELEGANT, ESQUIRE
on behalf of the Respondents

(Thereupon, the following proceedings were had:)

THE CLERK: Stein adoption. They didn't send the file down on this adoption.

MR. ELEGANT: Your Honor, Ira Elegant, Buchbinder and Elegant, representing the Respondents.

Your Honor, this an unusual case. There are a number of others like it and one precisely like this one. We have filed - -

THE COURT: I read your motion.

MR. ELEGANT: Your Honor, very simply, there is a basic point. Your Honor, as a County Court judge under administrative order, was appointed as an acting Circuit judge during these relevant time periods to handle and consider certain types of cases. The various administrative orders are attached as Exhibit E to our motion. The orders are described in Paragraph 7 of the motion and fall into a broad range of categories.

Your Honor entered an order determining paternity in December, 1986, and also entered a final judgment of adoption in May, 1987. Unfortunately, this was a prevalent practice where certain lawyers had walked orders like this through various --

MR. FRUMKES: I'm going to object to reference

to any other case but this one. It is inappropriate. It is not authority, and I must raise that objection.

MR. ELEGANT: It's argument.

As a matter of fact, a precise order which Judge Cook entered -- and I'm not telling you to abide by that one -- the same case as Exhibit I.

THE COURT: I read the whole pleading.

MR. ELEGANT: Essentially, what we are saying is that the orders which were entered by Your Honor -- and I'm sure it was just an innocent thing relying upon lawyers that appeared before you, who indicated that they had cases that were resolved, voided. Unfortunately, as an Acting Circuit Judge, your powers were set forth in the various administrative orders. Those administrative orders do not confer power to enter these types of orders upon Your Honor during the relevant time period. And certainly as a County Court Judge, your Honor would not have authority to enter an order determining paternity or enter an order of adoption.

We submit to you that the orders are void. The cases are clear that when you enter a void order it should be set aside upon motion or unilaterally, and we submit to you that these orders should be summarily set aside.

MR. FRUMKES: I notice counsel referred to an order that Judge Cook entered. He didn't mention who his opposing counsel was in that case, seeing that I'm in love with his opposing counsel because she's my wife.

I'm somewhat familiar with that case and I think my brother on the other side of the table, who I have a tremendous amount of respect for, would tell the Court that that order was entered by agreement. Just this morning at 6:00 when we both woke up, I learned that it was by agreement with counsel. So that order that Judge Cook entered is of no authority whatsoever. It's a different case, a different era. When I had dinner with Judge Harvey Sarkow last Thursday night, he had his own comments about that case.

First, let's talk about the order concerning paternity. The order, consent order determining paternity that was entered by the Michigan court after the child was born on January 14, 1987, which I give to the Court a certified copy --

MR. ELEGANT: Your Honor, I'm only dealing with the Florida orders.

MR. FRUMKES: That makes that argument moot, so that makes no difference whatsoever.

MR. ELEGANT: So then it should be vacated, if that's the case.

MR. FRUMKES: No, it shouldn't be vacated.

Ira, I only interrupted you for an objection. I apologize for speaking while you are interrupting.

MR. ELEGANT: Excuse me. You are right.

MR. FRUMKES: Counsel overlooked the fact that there's an administrative order 87-9 that did give Your Honor the authority to enter the adoption. I'm getting a sickness called deja vu. I think I have been here before. This is the third or fourth time I have been here on this case to uphold this adoption.

The challenge that I have heard so far in the oral argument, or the other arguments which were made before this Court, this Court has ruled on. The challenge is based upon the fact that this Court didn't have jurisdiction.

This 87-9 gave this Court jurisdiction. You properly entered the order for adoption. It cannot be challenged on that ground, nor, as a matter of fact, on any other ground, which I will be happy to argue when the time comes.

MR. ELEGANT: May I look at that, Your Honor?

Mr. Frumkes is mistaken. We have collected the

administrative orders which designate which judges are to hear which matters. The problem, what Mr. Frumkes has overlooked, the administrative order which is required under the administrative order 87-9. 87-9 says these matters will be heard by County Court judges acting as Circuit Court judges of the Eleventh Judicial Circuit under appropriate administrative order of the Chief Judge of this court.

There is no order which appoints Your Honor to implement this order. The administrative orders which we have attached to the motion, 87-59, assigns several County Court judges, including Your Honor, to temporarily serve as acting and temporary judges of the Family Division of the Circuit Court, to hear, try, conduct, determine and dispose of these cases assigned to them by the Associate Administrative Judge of the Family Division of the Circuit Court, effective May 1, 1987, through and inclusive of May 31, 1987, and thereafter dispose of all those matters considered by them during said period.

The problem is -- and here is a printout of the docket sheet in this case. There has been no separate administrative order implementing the order that Mr. Frumkes relies upon, under which Your Honor

was designated as an Acting Circuit Judge to hear adoption matters or paternity matters. The point of this is very simple. Mr. Frumkes is arguing that consent of any kind would override any of this. That is wrong. As a matter of law, parties cannot confer jurisdiction upon the Court, particularly subject matter jurisdiction. You can confer jurisdiction over the person by consent, but you can't confer subject matter jurisdiction. He would almost tell you that if somebody walked in here and said, "Your Honor, we have a patent infringement case and we are agreeing to have Your Honor hear this case," that confers subject matter jurisdiction, or a Securities Act violation under the Securities Act of 1934, where jurisdiction is vested solely in the federal district court.

You can't confer jurisdiction by consent. We submit, too, Your Honor, that the agreed order regarding paternity and the final judgment of adoption must be set aside. They are void. There's no order that implements this broad administrative order which Your Honor has the power to hear any of these.

MR. FRUMKES: Well, counsel, of course, is setting up a strawman, he says I said something that

I never argued and then he knocks it down. That's fine, but it doesn't get around the argument. We never talked about consent and conferring jurisdiction on the Court. 87-9 confers jurisdiction on this Judge under the appropriate administrative order which refers not to individual assignment of individual cases, but the appropriate administrative orders that give County judges authority to do this. I think you had authority under this order. You thought you had authority. Otherwise, you never would have entered it.

I think it's proper, and the appropriate administrative orders outline the duties of a County judge under such order. It's not a specific assignment.

Thank you, Your Honor.

MR. ELEGANT: We have laid them all out. It's a specific assignment.

THE COURT: Okay. Mr. Elegant, I went through your motion, detailed motion.

MR. ELEGANT: Yes, sir.

THE COURT: And I must comment and compliment you, that you did an excellent job in preparation. However, I'm going to deny your motion.

MR. ELEGANT: Okay.

MR. FRUMKES: Thank you, sir.

I don't mind if the Third District Court knows I'm in love with his opposing counsel in that other case.

MR. ELEGANT: Do you have a form order that you are going to use, Your Honor?

THE COURT: You can submit it.

MR. ELEGANT: Do you have one of them out here?

THE COURT: No, I don't.

(Thereupon, this hearing was concluded.)

CERTIFICATE

STATE OF FLORIDA)
: SS
COUNTY OF DADE)

I, ZULMA M. RUIZ, Registered Professional Reporter and Notary Public in and for the State of Florida at Large, hereby certify that the foregoing pages, numbered from 1 to 10, inclusive, are a true and correct transcription of my stenographic notes of the proceedings had and testimony taken before the Honorable Edward H. Swanko in the foregoing cause, at the time and place hereinabove set forth.

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal this 6th day of July, 1988.

/s/ Zulma M. Ruiz
ZULMA M. RUIZ, Notary Public
State of Florida at Large

My commission expires:

January 8, 1992